Supreme Court, U.S.
FILED

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No. 93-1657

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
October Term 1993

JERRY LOWERY,

Petitioner,

v.

T.E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer; J. V. SIMMONS, Individually and in his official capacity as a police officer; and CITY OF SOUTH BOSTON, VIRGINIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

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QUESTIONS PRESENTED

I. WHETHER THE FOURTH CIRCUIT AND THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PROPERLY APPLY CITY OF CANTON V. HARRIS REGARDING THE PROPER STANDARD FOR MEASURING DELIBERATE INDIFFERENCE IN TRAINING OFFICERS IN THE USE OF DEADLY FORCE.

II. WHETHER THE FOURTH CIRCUIT'S RULING SHOULD BE REVERSED TO AVOID CONFLICT WITH A RULING IN THE SECOND CIRCUIT ON THE PROPER STANDARD FOR MEASURING DELIBERATE INDIFFERENCE IN TRAINING OFFICERS IN THE USE OF DEADLY FORCE.

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

JERRY LOWERY, Petitioner, v. T.E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer; J. V. SIMMONS, Individually and in his official capacity as a police officer; and CITY OF SOUTH BOSTON, VIRGINIA, Respondents.	)	No. _____

PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT OF
THE UNITED STATES COURT OF APPEALS

Jerry Lowery, petitioner, by counsel, prays this honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's pre-trial dismissal of defendants J. V. Simmons and City of South Boston on their motion for summary judgment. The petition asserts that

both material facts and case law were overlooked in the decision rendered on December 21, 1993 in this case.

The petitioner challenges the applicability of the doctrine of qualified immunity to the actions of these defendants in the instant case, and maintains that, at the very least, the District Court acted prematurely in ruling on the qualified immunity question by way of a pre-trial grant of summary judgment, entered even before the completion of discovery and prior to the deposition of one of the defendant police officers (defendant Redd).

The petitioner also challenges the Fourth Circuit's decision not to follow the interpretation of Tennessee v. Garner, 471 U.S. 1 (1985), espoused by this Court in City of Canton v. Harris, 489 U.S. 378 (1989), and followed by the Second Circuit in Walker v. City of New York, 974 F.2d 293 (2nd Cir. 1992).

OPINION BELOW

The opinion of the Fourth Circuit below is Lowery v. T.E. Redd, et al., docket number 92-2450, unpublished. App. at A-1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The opinion and judgment of the Fourth Circuit were entered December 21, 1993. App. at A-3. The Fourth Circuit denied rehearing and the suggestion for rehearing en banc January 20, 1994. App. at A-5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, an citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .

This case also involves 42 U.S.C. § 1985, which provides in relevant part:

> If two or more persons in an State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . .; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person . . . or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

This case also involves the Fourth Amendment to the Constitution of the United States, which provides in relevant part, "The right of the people to be secure in their persons . . . shall not be violated . . . ."

Finally, this case involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

In the early morning hours of February 1, 1991, during a routine traffic stop, Lowery (an unarmed motorist) was shot in the head by defendant Stovall, a South Boston police officer. The bullet lodged in Lowery's brain and has caused permanent brain damage. The traffic stop was conducted by defendants Stovall and Redd, who were under the supervision of defendant Chief of Police Simmons, who was the policy-making official for defendant City of South Boston, Virginia.

Lowery filed a civil action under 42 U.S.C. § 1983 in the Federal District Court in the Western District of Virginia, Danville Division. The District Court ruled, with discovery not yet concluded, that summary judgment should be granted pre-trial to Simmons and City of South Boston, Virginia, because Lowery had not proffered sufficient facts from pre-trial discovery from which a reasonable trier of fact could find them liable. App. at A-22. The District Court denied similar motions from defendants Stovall and Redd. At the time of these rulings, defendant Redd had not yet been deposed due to the onset of a nervous condition that manifested after suit was

filed. App. at A-39. The Fourth Circuit reviewed the District Court's ruling under Fed. R. Civ. P. 54(b), and affirmed the District Court's ruling. App. at A-4.

REASONS FOR ISSUING A WRIT OF CERTIORARI

Lowery respectfully raises two points in this Petition for a writ of certiorari. The first is that no court in this case has addressed the alternate threshold of deliberate indifference required by City of Canton v. Harris in cases involving the unreasonable use of deadly force. The second is that the Fourth Circuit's ruling in this case conflicts with a ruling of the Second Circuit, and the opinion does not explain the distinction.

I. The Fourth Circuit and the District Court Below Overlooked Material Law in the Case of City of Canton v. Harris in Making Their Respective Decisions.

The issue in this appeal was whether the District Court was incorrect in granting summary judgment pre-trial to Simmons and City of South Boston, Virginia, especially in

light of the incomplete discovery. In making its ruling, the District Court correctly recognized that the holding in City of Canton v. Harris, 489 U.S. 378 (1989), provides the law of the case. However, the District Court failed to distinguish between the underlying facts in City of Canton v. Harris (failure to provide appropriate medical treatment) and the underlying facts in the case at bar (unreasonable use of deadly force -- a firearm). The justices in City of Canton v. Harris carved out an explicit exception to their general holding on the threshold at which "deliberate indifference" is established when the use of deadly force by a police officer is the basis of the cause of action. Id. at 390 n.10. Lowery respectfully submits that the fact that the unreasonable use of deadly force by police officers was the underlying incident in his case requires application of the alternate threshold specified in City of Canton v. Harris, not the application of the general threshold used by the Fourth Circuit.

During argument, counsel for Lowery urged the Fourth Circuit to consider the following language from City of

Canton regarding the alternate threshold at which policy makers have demonstrated deliberate indifference in violation of 42 U.S.C. § 1983 when deadly force is involved:

> It may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers of the city can reasonably be said to have been deliberately indifferent to the need.

Id. at 390. To illustrate this type of inherently dangerous situation, Justice White, writing for this Court, stated that:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see Tennessee v. Garner, 471 US 1, 85 L Ed 2d 1, 105 S Ct 1694 (1985), can be said to be "so obvious," that the failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Id. at 390 n.10. Justice O'Connor, in her concurrence, emphasized that

> it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. As the

> majority notes . . . the constitutional limitations established by this Court on the use of deadly force by police officers present one such situation. The constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue.

Id. at 396 (O'Connor, J., concurring) (citations omitted).

Lowery has presented credible evidence, including an unrebutted expert's affidavit, that neither Simmons nor City of South Boston made any effort to familiarize either themselves or their subordinates with the constitutional strictures of Tennessee v. Garner. App. at A-36. Based on this evidence, both Simmons and City of South Boston demonstrated deliberate indifference to Lowery's constitutional rights to be free from the unreasonable use of deadly force in violation of 42 U.S.C. § 1983.

Furthermore, neither the Fourth Circuit nor the District Court addressed the portion of the ruling in City of Canton v. Harris in which the United States Supreme Court expressed a preference for allowing the trier of fact in all cases to resolve

the issues underlying the "deliberate indifference" standard and the "closely related to the ultimate injury" requirement:

> Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her [constitutional rights]. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

Id. at 391 (footnotes omitted) (emphasis added). While the District Court properly identified the standard required by this language, it neglected to apply the advice given by the Supreme Court in the emphasized language regarding the important function of jury determinations in this instance. Indeed, the District Court's resolution of this issue in favor of Simmons and the City of South Boston is in conflict with its own resolution of the issues involving defendants Redd and

Stovall, wherein the District Court stated: "any determination as to the reasonableness of the use of deadly force against Lowery necessarily depends upon an acceptance of one account over the other." App at A-20. Yet, in granting summary judgment to City of South Boston, the District Court said that "Given Lowery's version of the facts, no amount of training could have prevented the unprovoked shooting of Lowery by Officer Stovall." App. at A-22 to -23. The District Court did not consider "how a hypothetically well-trained officer would have acted under the circumstances," nor did it consider the fact-finder's role in making this decision, as mandated in City of Canton v. Harris, 489 U.S. at 391.

II. The Ruling of the Fourth Circuit is in Conflict With a Ruling in the Second Circuit.

The Second Circuit Court of Appeals, in Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), recognized the importance of distinguishing among the different types of scenarios in which a "deliberate indifference" standard could

be applied. The Second Circuit, in making its ruling on the type of analysis that is generally required, carefully noted the type of consideration a municipality must make in training its police force in the use of deadly force. The Second Circuit pointed out that City of Canton v. Harris made direct reference to the use of deadly force by a police department as the type of scenario in which policy makers know "to a moral certainty" that city employees will have to make a "difficult choice" and that the failure to train police officers in the limitations of Tennessee v. Garner "would properly be characterized as 'deliberate indifference' to constitutional rights." Walker, 974 F.2d at 297 (quoting City of Canton v. Harris, 489 U.S. at 389-90).

Importantly, Walker, like City of Canton v. Harris, was not a case involving the unreasonable use of deadly force; nonetheless, both the Second Circuit and the United States Supreme Court found it appropriate to indicate the alternate "deliberate indifference" analysis suitable to § 1983 actions based on the unreasonable use of deadly force. Lowery's case

presents a § 1983 action based upon the unreasonable use of deadly force, and therefore must be analyzed under the alternate "deliberate indifference" standard.

This failure to train police officers in the requirements of Tennessee v. Garner has been presented by Lowery's evidence, and the Fourth Circuit's ruling on Lowery's evidence is in direct conflict with the analysis dictated by City of Canton v. Harris and Walker v. City of New York.

CONCLUSION

Lowery respectfully states that the District Court and the Fourth Circuit failed to address or apply City of Canton v. Harris' use-of-deadly-force exception. Under this mandate, the issue of the proper training in the use of deadly force becomes one for the trier of fact. Lowery respectfully submits that his interpretation is buttressed by the Second Circuit's holding in Walker v. City of New York.

For the foregoing reasons, Lowery prays that this Court grant his petition for a writ of certiorari to address these

critical constitutional issues and that this Court reverse the judgment of the Fourth Circuit regarding the summary judgment in favor of defendants Simmons and City of South Boston.

Respectfully submitted,

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Counsel for Plaintiff

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
October Term 1993
JERRY LOWERY,

Petitioner,

v.

T.E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer; J. V. SIMMONS, Individually and in his official capacity as a police officer; and CITY OF SOUTH BOSTON, VIRGINIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JERRY LOWERY,

Plaintiff-Appellee,

v.

T. E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer,

Defendants-Appellants,

and

J. V. SIMMONS, Individually and in his official capacity as a police officer; CITY OF SOUTH BOSTON, VIRGINIA,

Defendants.

No. 92-2450

JERRY LOWERY,
Plaintiff-Appellee,

v.

T. E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer,
Defendants-Appellants,

and

J. V. SIMMONS, Individually and in his official capacity as a police officer; CITY OF SOUTH BOSTON, VIRGINIA,
Defendants.

No. 92-2551

JERRY LOWERY,
Plaintiff-Appellant,

v.

T. E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer; J. V. SIMMONS, Individually and in his official capacity as a police officer; CITY OF SOUTH BOSTON, VIRGINIA,
Defendants-Appellees.

No. 93-1153

Appeals from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-92-4-D)

Argued: September 29, 1993

Decided: December 21, 1993

Before HALL, PHILLIPS, and HAMILTON, Circuit Judges.

Affirmed by unpublished per curiam opinion. Judge Hall wrote the opinion, in which Judge Phillips and Judge Hamilton joined.

COUNSEL

ARGUED: John H. OBrion, Jr., COWAN & OWEN, P.C., Richmond, Virginia, for Appellants. G. Rodney Sager, ROD SAGER & ASSOCIATES, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

In the early morning of February 1, 1991, during a traffic stop gone awry, Jerry Lowery was shot in the head by Larry Stovall, a police officer for the city of South Boston, Virginia. Lowery later brought this suit, alleging claims under state law and 42 U.S.C. §§ 1983 and 1985, against Stovall; Thomas E. Redd, the other officer on the scene; J. V. Simmons, the chief of police for the city of South Boston; and the city itself.

After some discovery, the defendants moved for summary judgment. Redd and Stovall's motions were based on qualified immunity.

The district court denied Stovall's motion because, if Lowery's assertions of fact were true, no reasonable officer could have believed that the shooting was lawful. *See Rainey v. Conerly*, 973 F.2d 321 (4th Cir. 1992). The court denied Redd's motion because of inadequate discovery — Redd's deposition had not yet been taken, and the court expressly stated that it would reconsider the motion after the deposition.

On the other hand, because Lowery had not proffered facts from which a reasonable trier of fact could find Chief Simmons or the city liable, the court granted them summary judgment.

Stovall and Redd appealed, and we have jurisdiction under the doctrine of *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (denials of motions to dismiss or for summary judgment based on qualified immunity are immediately appealable). The district court certified under Fed. R. Civ. P. 54(b) that there was no just reason for delaying Lowery's appeal of the summary judgment entered for Simmons and the city, and Lowery cross-appealed.

We have considered the briefs and arguments of the parties, and we affirm the judgment of the district court for the reasons stated in its memorandum opinion. *Lowery v. City of South Boston, Virginia*, No. 92-0004-D (W.D. Va., Oct. 15, 1992).

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 20, 1994

No. 93-1153
CA-92-4-D

JERRY LOWERY

Plaintiff - Appellant

v.

T. E. REDD, Individually and in his official capacity as a police officer; LARRY STOVALL, Individually and in his official capacity as a police officer; J. V. SIMMONS, Individually and in his official capacity as a police officer; CITY OF SOUTH BOSTON, VIRGINIA

Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

JERRY LOWERY,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 92-0004-D
v.	)	
	)	MEMORANDUM
	)	OPINION
CITY OF SOUTH BOSTON,	)	
VIRGINIA,	)	By: Jackson Kiser, Judge
	)	United States
LARRY STOVALL, individually	)	District Court
and in his official	)	
capacity as a police	)	
officer,	)	
	)	
T. E. REDD, individually and	)	
in his official capacity	)	
as a police officer, *and*	)	
	)	
J. V. SIMMONS, individually and	)	
in his official capacity	)	
as a police officer	)	
	)	
Defendants.	)	

PROCEDURAL HISTORY

This is an action filed by plaintiff, Jerry Lowery, alleging various violations including: Virginia state law negligence,

Virginia state law assault and battery, and 42 U.S.C. §§ 1983 & 1985 civil rights violations. Defendants, City of South Boston, Officer Larry J. Stovall, Officer Thomas E. Redd, and Chief J.V. Simmons (collectively "Municipal Defendants") have filed a consolidated motion for summary judgment. Lowery has filed a brief in opposition to the Municipal Defendants' motion. Oral arguments were heard before me in Lynchburg District Court on October 6, 1992. The motion is now ripe for disposition.

SUMMARY JUDGMENT STANDARD AND FACTS

Federal Rule of Civil Procedure 56(c) provides that a moving party is entitled to summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P.56(c). The party moving for summary judgment is initially responsible for identifying those portions of the factual record

which it believes establish that there are no genuine issues of material fact. Once the moving party has made this showing, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable issue of fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 232-24 (1986). In deciding a motion for summary judgment, the court is required to view the facts and draw reasonable infrerences in a light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

STATEMENT OF FACTS

The following factual account is set forth in accordance with the above standard. In the early hours of February 1, 1991 Officers Larry J. Stovall ("Stovall") and Thomas E. Redd ("Redd") of the South Boston Police Department pulled over Jerry Lowery ("Lowery") pursuant to a "routine" traffic stop. The events which occurred before and during the traffic stop are unclear as Lowery's suffered serious injuries during

the stop which affected his memory. Unfortunately, Lowery was shot in the head by Officer Stovall during the traffic stop in what turned out to be an extraordinary occurrence. As Lowery is unable to recall specific details of the events preceding his shooting, the factual accounts of both the Plaintiff and the Defendants are set forth below in the light most favorable to the non-moving party.

(1) Lowery's Statement of the Facts.

On Thursday evening, January 31, 1991, plainitff left his residence in South Boston between 7:00 and 8:00 p.m. At approximately 1:00 a.m., Officer Redd, while on patrol, first spotted Lowery's car in the western part of the City. Shortly thereafter, Lowery's car was again spotted stopped at an unlighted house on Webster Street, and Officer Redd saw Lowery walking from the back of the house to the front porch of the house. Officer Redd stopped and exited his patrol car and asked Lowery why he had been behind the unlighted house. Lowery told Officer Redd that he was lost and that he was from Richunond. Lowery was permitted to drive his

vehicle away. Officer Redd returned to the patrol car and shortly later radioed Lowery's information to the police dispatcher. The dispatcher informed Offlcers Redd and Stovall that Lowery was driving on a suspended driver's license and that Lowery's car was registered in Richmond, Virginia. Officers Redd then started to search for Lawery's car in South Boston. Officer Redd located Lowery's vehicle at 1:30 a.m. in the vicinity of the Willow Oaks Apartments. Offlcer Redd approached Lowery's parked car and asked Lowery for his driver's license which, according to Lowery, he presented to Redd from his wallet while Lowery was standing outside of his vehicle. Officer Redd informed Lowery that he was driving on a suspended license and asked Lowery to accompany him to the patrol car. At the same time Officer Redd called Officer Stovall over to the patrol car, and Officer Stovall sat in the back seat of the patrol car. Lowery accompanied Officer Redd to the patrol car where Lowery sat in the front seat while Redd was issuing Lowery a summons

and checking the reason why Lowery's license had been suspended.

Thereafter, Officer Redd asked Lowery to show him the contents of his pocket. Lowery consented and exited the car to show Redd what was in his pockets. While Lowery was standing outside the car, holding the contents of his pockets in his hands, Officer Redd remained in the driver's seat waiting for the reason why Lowery's license was suspended. Lowery asserts that Officer Stovall got out of back seat of the patrol car "charged him" and shot him in the side of the head from a distance of approximately an arm's reach. Lowery maintains that he was unarmed and did not strike or attempt to strike either of the officers before the shooting. Lowery went down on one knee outside the patrol car. Lowery began crawling to the patrol car, when both officers Redd and Stovall tackled Lowery preventing him from getting inside the patrol car. During this struggle, Lowery scratched officer Redd in the face with his fingernail.

Lowery denies being in possession of a key holder which the defendants allege was used to cut Officer Redd and which

contained a quantity of cocaine. Defendants also allege Lowery had a passenger in his car but Lowery denies this.

Lowery was taken to the Halifax-South Boston Community Hospital for emergency treatment. Later, Lowery was charged with operation a motor vehicle with a revoked license, possession with the intent to distribute cocaine, and with maliciously wounding and causing bodily harm to Redd. Lowery's criminal charges were dropped by the Halifax County Circuit Court because the court found that Lowery was not mentally competent to assist his council or to stand trial. On January 30, 1992 Lowery brought this action against the Municipal Defendants.

(2) Officers Redd and Stovall's Statement of the Facts

Officers Redd and Officer Stovall's version of what occurred in the early morning hours of February 1, 1990 is quite different and diametrically opposed Lowery's version of the facts. Officers Redd and Stovall maintain that Lowery was driving into the Willow Oaks Apartments when Officer Redd pulled over

Lowery. Officer Redd approached the drivers side of Lowery's car, and asked for Lowery's operator's licenses. Officer Redd informed Lowery that he was driving under a suspended license. Lowery became agitated and began cussing; shortly thereafter, Officer Redd asked Lowery to return to his patrol car so he could issue Lowery a summons. While Officer Redd and Lowery were walking toward the patrol car, a unknown female exited Lowery's vehicle and ran away carrying something in her hand. Lowery demanded to know why his license had been suspended, and Officer Redd radioed the dispatcher to inquire as to the reasons. Lowery was seated in the front passenger seat of the patrol car; Officer Redd was seated in the driver seat of the patrol car. Lowery appeared nervous and getting in and out of the patrol car. Officer Redd asked Officer Stovall to join him in the patrol car. Officer Stovall then sat in the back seat of the patrol car; there was no divider between the seats.

Without warning Lowery became violent in the front seat of the police car and attacked Officer Redd by slashing him across the face and neck with a sharp object. Officer Redd screamed

"Knife," and Officer Stovall attempted to restrain Lowery by reaching over the seat with both hands and grabbing Lowery's shoulders. Since Officer Stovall's efforts were unsuccessful, he grabbed Lowery by the back shirt collar with his left hand and punched Lowery in the base of his skull with "as much force as possible.[1]" Lowery was unfazed by the officers attempts to control Lowery as Lowery possessed abnormal strength in the patrol car. Lowery turned and started to climb over the seat and attempted to attack Stovall with the object, however, Stovall deflected Lowery's attack, unsnapped his holster, drew his revolver, and shot Lowery in his left temple. After the shooting, no knife was found at the scene -- only a black plastic magnetic key holder approximately three inches long and one inch wide.

(3) Miscellaneous Facts

All the City of South Boston Police Officers receive their basic training at the Virginia Criminal Justice Academy (the "Academy") in Lynchburg, Virginia. In addition to basic

[1] Officer Stovall was a heavyweight boxer when he was in the Marine Corps and compiled a 38-2 boxing record.

training, officers receive annual in-service training given or sponsored by the Academy. All officers are issued mace, but Officer Stovall decided not to carry it on February 1, 1991. Officer Stovall has been a police officer with the South Boston Police Department for approximately 11 years prior to the February 1, 1991 shooting of Lowery. Prior to becoming a member of the South Boston Police Department, Stovall was a member of the Halifax Police Department for less than one year. The South Boston Police department has received various complaints from citizens concerning Officer Stovall; however, only one of these complaints could even arguably be related to Officer Stovall excessive use of force, and it occurred in July of 1985.

Lowery has also obtained a sworn witness statement from two South Boston residents who were listening to police radio transmissions in the early morning hours on February 1, 1991 and overheard conversation between South Boston Police officer related to the Lowery shooting.

DISCUSSION

I. Sections 1983 & 1985 - Qualified Immunity against Officer Redd and Officer Stovall

The basic principles of qualified immunity are well settled, and a recent decision of the Fourth Circuit governs the instant motion and clearly explains the basic purpose of qualified immunity. See Rainey v. Conerly, No. 91-7248, No. 91-7249 (4th Cir. Aug. 19, 1992). Police officers, in performing their duties, are accorded latitude in exercising what are inescapably discretionary functions replete with "judgment calls " See Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). Fourth Amendment law as to deadly force was well established at the time of Officer Stovall's shooting of Lowery on February 1, 1991 as the Supreme Court had concluded that deadly force may be used "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." Tennessee v. Garner, 471 U.S. 1, 11, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985). It also was established that every person has the right not to be subjected to unreasonable or

excessive force while being arrested or detained by a police officer. Graham v. Connor, 490 U.S. 386 (1989). In Graham the Supreme Court stated:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than the 20/20 vision of hindsight .... [and] the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

490 U.S. at 396-97.

Defendants' reliance on Gooden v. Howard County, M.D., 954 F.2d 960 (4th Cir. 1992) is misplaced. Rainey v. Conerly, No. 91-7248, No. 91-7249 (4th Cir. Aug. 19, 1992), limited the Gooden holding to those situations where there is no credibility issue as to the underlying operative facts. In Rainey the plaintiff was a pretrial detainee who brought a section 1983 action against a prison guard for alleged excessive use of force while being transported from his cell block to the prisoner visitation area. The alleged excessive use of force was the guard's act of dragging Rainey into a jail corridor and slamming him into a wall three times, thereby causing injuries to Rainey's back. In

defense of his actions, the guard asserted qualified immunity and contended that the amount of force used was necessary to defuse a volatile situation presented by a large crowd of inmates congregating by an unlocked inner cell block door that could only be locked by re-entering the vestibule. The guard also argued that he only fell against Rainey when they re-entered the corridor. Id. The Fourth Circuit stated:

> Unlike Gooden where what actually happened did not need to be resolved by they trier of fact in order to reach a decision on the applicability if qualified immunity, in this case a determination of what actually happened is absolutely necessary to decide whether Conerly could reasonably have believed that his action were lawful. Conerly does not claim, as did the officers in Gooden, that he operated under a mistaken, but reasonable, perception of the facts. Instead, the crux of the dispute resolves entirely around the level of force utilized by Conerly in removing Rainey form the vestibule. If Rainey's version of the facts is credited, then Conerly's actions could not, by any reasonable officer, be considered to be within the bounds of the law. Conversely, if Conerly version is believed, then, not only would qualified immunity be applicable, but Rainey would have no valid claim for use of excessive force. The determination of what actually happened depends exclusively on an assessment of the credibility of the respective witnesses. This assessment is a dispute issue of fact and, therefore, cannot be resolved on summary judgment or directed verdict. Crediting Rainey's version of the facts, as were are required to do in this context,

> we must find that the district court was correct in declining to grant Conerly's motion.

Id. at 5-6 (slip op.)

The evidentiary situation in the instant case is analogous to that in Rainey. The parties present conflicting, irreconcilable accounts of the February 1, 1991 incident and any determination as to the reasonableness of the use of deadly force against Lowery necessarily depends upon an acceptance of one account over the other. On a summary judgement motion, the creditability of conflicting testimony is not an issue to be decided by this court. Summerlin v. Edgar, 809 F.2d 1034, 1039 (4th Cir. 1987). Officer Stovall failed to meet his burden of showing that here is no genuine issue of material fact as to Lowery's § 1983 and 1985 claims against him. Therefore, I must deny Officer Stovall's motion for summary judgment on Lowery's section 1983 and 1985 claims. Viewing the evidence in the light most favorable to the non-moving party, I must also deny Officer Redd's motion for summary judgement at this time since it has been impossible to take Officer's Redd deposition due to his

unanticipated medical condition. I will reconsider Officer Redd motion after his deposition can be taken.

II. Section 1983 claim against the City of South Boston and Chief Simmons

(1) City of South Boston

An essential element of a section 1983 plaintiff's claim against a municipality is that the denial of plaintiff's constitutional right be caused by and official policy or custom of the municipality. A failure to properly train or supervise police officers may satisfy this requirement if that failure is so severe as to constitute "gross negligence" or "deliberate indifference" to plaintiffs constitutional rights. City of Canton v. Harris, 489 U.S. 378 (1989). In determining whether a deficiency in training constitutes a municipal "policy" of deliberate indifference, a court must look at "the adequacy of the training program in relation to the tasks the particular officers must perform." Id. at 109 S.Ct 1205-6. In Canton, the Supreme Court further held that a municipality's failure to train or

supervise must be **"closely related to the ultimate injury"** to the extent that one can say that the "injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect." Id. at 391. (emphasis added). According to the Supreme Court, it will not "suffice to prove that an injury or accident could have been avoided if an officer had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." 489 U.S. at 391, 109 S.Ct. at 1206.

There is no evidence that the defendants made a "deliberate" or "conscious" choice not to train the police officers in this respect, knowing that there failure to do so would "likely . . . result in the violation of constitutional rights." Id. 489 U.S. at 390, 109 S.Ct. at 1205[2]. Given Lowery's version of the facts, no amount of training could have prevented the

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[2] See also Collins v. City of Harker Heights, ___ U.S. ___; 112 S.Ct 1061; 117 L.Ed.2d 261 (1992) where, on a substantive due process violation cliam, the court dismissed a complaint that allege the city was deliverately indifferent to decedents safety by failure to train him, as not stating a cause of action.

unprovoked shooting of Lowery by Officer Stovall. Therefore, I grant the City of South Boston's motion for summary judgement on the section 1983 claim.

(2) Chief Simmons

In order for Lowery to hold Chief Simmons liable under section 1983, he has to show the same degree of culpability as Lowery has to show for the City of South Boston, i.e. "deliberate indifference" to the plaintiff's constitutional rights. Harris 489 U.S. at 390, 109 S.Ct. at 1205. The Fourth Circuit has held that liability can be established when a defendant is personally involved in the unconstitutional conduct. Vinnedge v. Gibbs, 550 F.2d 926, 928 (4th Cir. 1977). Moreover, the Fourth Circuit has held that in order to hold a supervisor liable, the supervisor must have known of the need for him to act to put a halt to the alleged unconstitutional conduct or conditions. Withers v. Levine, 615 F.2d 158 (4th Cir. 1980), cert. denied, Withers v. Levine, 449 U.S. 849, 66 L.Ed.2d 59, 101 S.Ct. 136 (1980).

Even if Lowery was able to show that an individual officer violated his "constitutional rights on one occasion, that is not sufficient to raise an issue of fact whether adequate training and procedures were provided." Orpaino v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980) (quoting McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979). The Tenth Circuit has recognized, however, that there are certain circumstances whereby an isolated incident of police misconduct can render a city liable under section 1983, as in the situation where there is direct evidence that the police officer involved had received no training whatsoever. Rock v. McCoy, 763 F.2d 394, 398 (10th Cir. 1985). Unlike the city in Rock, the City of South Boston did provide extensive training for all its officers including Redd and Stovall. All the City of South Boston Police Officers receive their basic training at the Virginia Criminal Justice Academy (the "Academy") in Lynchburg, Virginia. In addition to basic training, officers receive annual in-service training given or sponsored by the Academy.

Lowery relies on the affidavit of his police expert, D.P. Van Blaricom, to show the various deficiencies in the South Boston police department, including, but not limited to the following: (1) no ongoing training provided on use of force after basic training, and (2) no training in the use-of-force decisions by the United States Supreme Court. Unfortunately, these deficiencies do not rise the to stringent requirement as set forth by the Supreme Court in Harris. Therefore, I must grant Police Chief Simmons motion for summary judgment on the section 1983 claim.

III. State Claims

Invoking the doctrine of sovereign immunity, the City of South Boston and Chief Simmons have also moved for summary judgment on the state law claims. Because I have found that the section 1983 claims against the City and Chief Simmons must be dismissed, there is no other ground of federal jurisdiction over these defendants. Therefore, under the dictates of United Mine

Workers v. Gibbs, 383 U.S. 715 (1966), I will dismiss without prejudice the state law claims.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

JERRY LOWERY,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 92-0004-D
	)	
	)	
v.	)	
	)	ORDER
CITY OF SOUTH BOSTON, VIRGINIA,	)	
	)	
LARRY STOVALL, individually and in his official capacity as a police officer,	)	
	)	
T. E. REDD, individually and in his official capacity as a police officer, *and*	)	
	)	
J. V. SIMMONS, individually and in his official capacity as a police officer	)	
	)	
Defendants.	)	

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is ADJUDGED, ORDERED and DECREED that:

1) Defendant City of South Boston's motion for summary judgment is MOOT as to Counts IV and V.

2) Defendant J. V. Simmons' motion for summary judgment is MOOT as to Counts IV and V.

3) Defendant T. E. Redd's motion for summary judgment is DENIED.

4) Defendant Larry Stovall's motion for summary judgment is DENIED.

5) The Complaint is dismissed as to Defendants City of South Boston and Chief J. V. Simmons.

The Clerk is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

ENTERED this 15th day of October, 1992.

_____

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
VIRGINIA

JERRY LOWERY,	)	
	)	
Plaintiff,	)	**Civil Action**
	)	**No. 92-CV-0004-D**
	)	
	)	
v.	)	
	)	**AFFIDAVIT OF**
CITY OF SOUTH BOSTON,	)	**D.P. VAN**
	)	**BLARICOM**
VIRGINIA,	)	
	)	
LARRY STOVALL, individually	)	
and in his official	)	
capacity as a police	)	
officer,	)	
	)	
T. E. REDD, individually and	)	
in his official capacity	)	
as a police officer, *and*	)	
	)	
J. V. SIMMONS, individually	)	
and in his official capacity)		
as a police officer	)	
	)	
Defendants.	)	

The undersigned being first duly sworn, on oath states as follows:

1. That my name is D. P. Van Blaricom and I make this affidavit on behalf of plaintiff. I was the Chief of Police for the City of Bellevue, Washington from January 1, 1975 thru December 31, 1985 and my law enforcement career spanned 29 years of continuous police service. A detailed statement of my qualifications, including academic background and employment history are set forth on the attached Exhibit "A", which by reference is made a part hereof. My areas of expertise in the police sciences include but are not necessarily limited to police use of force; less-lethal alternatives to deadly force; criminal investigation; police policy and administration; police standards, practices and procedures; firearms; internal investigation and police discipline. I have testified as a police expert opinion witness in state and federal courts on a variety of police-related issues for both plaintiff and defense.

2. I was retained by plaintiff's attorney Rodney Sager to review the facts and circumstances of plaintiff being shot by Officer Larry J. Stovall on February 1, 1991 in the

City of South Boston, Virginia and at the time of making this report I have reviewed the following:

a. Police reports of the incident;

b. The radio log for the period of the incident;

c. The South Boston Police Department's General Order on Firearms;

d. The South Boston Police Department's Rules and Regulations;

e. Videotapes of Officer Stovall's deposition (2);

f. Videotapes of Lieutenant Rice's deposition (3);

g. Videotapes of Dispatcher Comer's deposition (2);

h. Videotapes of Officer White's deposition (2);

i. Videotape of the involved police vehicle; and

j. Various related color photographs (43).

3. In my professional opinion there was no probable cause to believe that plaintiff's driver's license was suspended and the traffic stop of plaintiff was without lawful

authority. In reaching that conclusion I considered the following facts:

a. Officer T. E. Redd had previous contact with plaintiff but had failed to identify him; and

b. He subsequently stopped plaintiff on the mere assumption that the driver of the vehicle was also the registered owner thereof.

4. In my professional opinion plaintiff was not armed with any weapon capable of causing death or serous injury and there was no reasonable suspicion to believer that he was armed. In reaching that conclusion I considered the following facts:

a. No weapon was ever found;

b. The alleged "weapon" was only a small black plastic key holder measuring 2 3/4 inches by 1 1/2 inches; and

c. No objectively reasonable police officer could interpret or suspect such an object to be a dangerous weapon.

5. In my professional opinion the shooting of plaintiff by Officer L. J. Stovall was a grossly excessive use of force and objectively unreasonable. In reaching that conclusion I considered the following facts:

a. Plaintiff and neither the means nor the opportunity to place the officers in fear of death or serious bodily injury;

b. Plaintiff was detained for no more than a traffic misdemeanor; and

c. Officer Stovall intentionally used lethal force to shoot plaintiff in the head.

6. in my professional opinion there were far lesser force alternatives available to the police officers for control of plaintiff. In reaching that conclusion I considered the following facts:

a. Plaintiff was not armed;

b. There were 2 officers present;

c. Officer Stovall is of great strength and a professionally trained heavyweight boxer; and

d. Officer Stovall could have struck plaintiff with his readily available blackjack if it had been necessary to do so.

7. In my professional opinion the shooting of plaintiff violated the South Boston Police Department's General Order on Firearms. In reaching that conclusion I considered the following facts:

a. Officers are only authorized to discharge firearms to "prevent an attack with a deadly weapon" or "to defend himself or other persons from death or serious injury" but neither of these factors was present; and

b. Officers are prohibited from discharging firearms to "effect the arrest of a misdeameaner (sic)".

8. In my professional opinion the shooting of plaintiff violated the South Boston Police Department's Rules and Regulations. In reaching that conclusion I considered the following facts:

a. An officer is required to "conduct himself at all times in keeping with Code of Ethics" and that code states "I will never employ any unnecessary force or violence";

b. The "use of any unnecessary force is prohibited";

c. Officers "shall not use more force in any situation than is reasonably necessary under the circumstances"; and

d. "Officers shall use force in accordance with the law".

9. In my professional opinion the South Boston Police Department has demonstrated deliberate indifference to training officers in the use of force. In reaching that conclusion I considered the following facts:

a. There is no ongoing training provided on use of force after basic training;

b. There is no training on use of force decisions by the United State Supreme Court;

c. Lieutenant H. B. Rich is second in command of the South Boston Police Department and yet he know nothing of Tennessee v. Garner, Graham v. Connor, or any other case law regarding shooting of suspects; and

d. In fact, Lieutenant Rice has no understanding of the concept of "objective reasonableness" as it pertains to use of force and has had no further training in use of force since he completed basic training over 20 years ago.

10. In my professional opinion Officer Stovall was a known disciplinary problem and was negligently assigned as a shift supervisor. In reaching that conclusion I considered the following facts:

a. Lieutenant Rice an cite a litany of complaints that have been made against him by both citizens and the South Boston Police Department; and

b. In one instance he lost his temper and wanted to fight with a suspect until other officers intervened.

11. In my professional opinion the investigation of plaintiff's shooting was far below the standard of care for such an incident and so seriously flawed as to raise legitimate questions of fact as to how it actually occurred. In reaching that conclusion I considered the following facts:

a. The South Boston Police Department's General Order on Firearms requires a "thorough and objective investigation" of a police involved shooting and this was neither by any measure;

b. The standard of care for police involved shootings is that they be meticulously investigated to resolve all inconsistencies that my be discovered from the evidence and/or accounts of the witnesses;

c. This investigation was superfluous at best and leaves numerous inconsistencies in the alleged facts unquestioned;

d. Even though Lieutenant Rice had never investigated a police involved shooting before and had requested State Police assistance in a non-police

shooting just a month previously, he requested no such assistance in this case where the results show that it was clearly needed.

12. As additional information is made available for my review the opinions state herein my be modified or expanded upon.

_____
D. P. VAN BLARICOM

SUBSCRIBED AND SWORN to before me this 28th day of September, 1992.

_____
NOTARY PUBLIC in and for the State
of Washington residing at Bellevue.
My Commission expires 11/10/95

MEDICAL SURGICAL
ASSOCIATES
OF SOUTH BOSTON, INC.

1129 NORTH MAIN STREET
SOUTH BOSTON, VA 24592
(804) 572-2961

September 30, 1992

Mr. John H. OBrion, Jr.
Cowan & Owen, P.C.
Attorneys and Counselors at Law
1930 Huguenot Road
Richmond, Virginia 23235-0655

Re: Thomas Redd

Dear Mr. OBrion:

This letter is about my patient, Officer Thomas Redd. Officer Redd was admitted to the Halifax-South Boston Community Hospital on 9/11/92 with an acute cerebrovascular accident consisting of numbness and partial weakness of his left face and left upper and lower extremities. He was brought by Rescue Squad from the Police Station to the emergency room following a witnessed syncopal episode with frontal headaches, photophobia, and nausea without vomiting. In the

emergency room, his physical exam confirmed the presence of a left sided weakness. He was admitted to the hospital and had an extensive neurological workup done consisting of two CAT scans of the head, an MRI of the head, a spinal tap as well as a collagen vascular and a vasculitis workup. All the tests were within normal limits, but Officer Redd continued with a mild left sided weakness. Physical therapy was initiated and continued throughout his stay in the hospital. Because of the totally negative workup, it was felt that Officer Redd's cerebrovascular accident was most likely the result of a severe classic, complicated migraine headache. He apparently has been under significant stress at work which could have precipitated his severe complicated migraine attack. Mr. Redd was discharged from the hospital on September 18, 1992 in stable condition. He is presently in a recovery period with an intensive occupational rehabilitation therapy to try to improve his left sided weakness. During this recovery period, Officer Redd will be restricted of any stressful physical or mental activities. At this point, it is unclear to whether Officer

Redd's partial neurological deficit will be reversible or permanent. In November, 1992, his medical condition will be reassessed before his clearance to resume routine physical activities.

Thank you for your attention, and please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Habib F. Bassil, M.D.
Cardiologist